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SUPREME COURT, U.S.

IN THE SUPREME COURT FOR THE UNITED STATES

NO: 80-6786

ROBERT STRICKLAND,

PETITIONER

VS.

STATE OF GEORGIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, ROBERT STRICKLAND, respectively prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on February 10, 1981.

OPINION BELOW

The Opinion of the Supreme Court of Georgia is to-date unpublished but the Slip Opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 10, 1981, affirming Petitioner's conviction and sentence of death dated January 14, 1980. A timely Petition for Rehearing was denied on March 3, 1981. This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Whether, in affirming the Trial Court's refusal to feel that the Petitioner was mentally incompetent to stand trial, pursuant to an examination by the Forensic Service Team of the Georgia Mental Health Institute, has effectively denied the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the Trial Court's refusal to direct a verdict in favor of the Special Plea of Insanity, has effectively denied the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the Trial Court's refusal to allow Petitioner's Counsel to be present during the psychiatric examination, has effectively denied the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the Trial Court's request that Petitioner plead to the indictment before his mental competency had been determined, effectively denied the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the Trial Court's refusal to permit Petitioner's Counsel to explain in the opening statement and argue in the closing argument the consequence under Georgia Code 27-1502 of a finding in favor of the Special Plea has effectively denied the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the Trial Court's refusal to allow Petitioner's Counsel to inquire of the expert medical witness if treatment would enable Petitioner to competently stand trial at a later date, effectively denies the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the Trial Court's refusal to allow Petitioner's Counsel to argue the consequence of a verdict of "Not Guilty by Reason of Insanity", effectively denies Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the verdict in finding against the Special Plea and the recitation of facts by the Court below as authorizing the verdict, has effectively denied Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

Whether, in affirming the imposition of the death sentence in Petitioner's case, the Supreme Court of Georgia adopted such a broad and vague construction of the Georgia Code Annotated 27-2534.1(b)(7) aggravating circumstances as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

Whether, in affirming the imposition of the death sentence in Petitioner's case, the Supreme Court of Georgia adopted such a broad and vague construction of the Georgia Code Annotated 27-2534.1(b)(2) aggravating circumstances as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

Whether, in affirming the Trial Court's Order to compel a psychiatric examination, without the presence of his counsel, effectively denied the Petitioner of equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

The Constitutional and statutory provisions are as follows:

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

Ga. Code Ann. Section 27-2534.1(b)(2):

> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and

any of the following statutory aggravating circumstances which may be supported by the evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

Ga. Code Ann. Section 27-2534.1(b)(7):

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

STATEMENT OF THE CASE

The Petitioner, ROBERT STRICKLAND, was indicted in the Superior Court of Hall County, Georgia, on three counts of murder and three counts of aggravated assault. Counsel was appointed to represent the Petitioner by the Court. The indictment was returned by the Grand Jury and filed for record on the 14th day of January, 1980, the same being Indictment Number P-45860.

The Petitioner filed a Motion for Discovery, a Motion to Quash, a Motion for Psychiatric Evaluation and a Special Plea of Insanity, and entered his plea of not guilty to the charges in the indictment. The Trial Court ordered psychiatric evaluation of the Petitioner by the Forensic Service Team of the Georgia Mental Health Institute of Atlanta, Georgia. The Petitioner filed a written response through his Counsel and requested that his Court appointed Attorney be present during the examination. The Court overruled the Motion and ordered the examination and requested that copies of the examination and recommendation be served to District Attorney and Defense Counsel. The Order was entered on April 21st, 1980. The Petitioner was then examined by the Forensic Team on three different occassions, possibly four, and returned a written report and a recommend-

ation found the Petitioner incompetent to stand strial.

The Court, thereupon, ordered the Petitioner to stand trial on the Special Plea of Insanity on the 16th day of June, 1980. Thereafter, on the 18th day of June, 1980, the Jury returned a verdict against the Special Plea of Insanity. The Court then ordered the Petitioner to stand trial on the indictment charging three counts of murder and three counts of aggravated assault. The trial commenced on the 19th day of June, 1980, and on June 23rd, 1980, the Jury returned a verdict of guilty on all six counts.

The Petitioner, at that time, filed a Motion for Medical and Psychiatric Examination to be used in the punishment phase of the trial and the Trial Court denied the Motion on June 25th, 1980.

Thereupon, the punishment phase of the trial was begun and after overruling the Motion by the Petitioner for Medical and Psychiatric Evaluation, and upon instructions to the Jury, the issue of punishment was submitted to the Jury along with a written statement of what the Court charged to be aggravating circumstances in the language of the statute and a written form containing a blank to insert the particular aggravating circumstances, and a blank to fix the punishment.

The Jury completed the forms and returned a verdict finding the aggravating circumstances Section 27-2534.1 (6) (7) and (B-7) (B-2) and fixed the punishment as death. This was returned on the 25th day of June, 1980.

REASONS FOR GRANTING THE WRIT

1. The Court below bases it's approval of the Trial Court's refusal to find that the Petitioner was mentally incompetent to stand trial pursuant to an examination by the Forensic Service Team of the Georgia Mental Health Institute and a report submitted by it to the Trial Court pursuant to the provisions of the Trial Court's Order on an erroneous interpretation of the Forensic Team Report. Certiorari should be granted because such ruling and interpretation effectively denies Petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

2. The Court below bases it's approval of the Trial Court's refusal to direct a verdict in favor of the Special Plea of Insanity on an erroneous interpretation of the evidence. Certiorari should be granted because such

ruling effectively denies Petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court below bases it's approval of the Trial Court's failure to provide Petitioner with his Counsel's presence at the psuchiatric evaluation on an interpretation that this was not a "critical stage" of the proceeding. Certiorari should be granted for the reason that such ruling effectively denies Petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to eh United States Constitution.

4. The Court below bases it's approval of the Trial Court's requiring the Petitioner to plead to the indictment before his mental competency was determined, on the erroneous interpretation that the record fails to provide a basis for such ennumeration of error. Certiorari should be granted for the reason that such ruling effectively denies Petitioner equal protection and due porcess under the law in violation of the Fourteenth Amendment to the United States Constitution.

5. The Court below bases it's approval of the Trial Court's failure to order the transcription of the opening statement, and by refusing to allow Petitioner's Counsel to explain, during his opening statement and closing argument, the consequences under Georgia Code Annotated Section 27-1502 of a finding in favor of the Special Plea of Insanity, on the interpretation that such proceeding was "civil in nature". Certiorari should be granted for the reason that such ruling effectively denies Petitioner of equal protection and due process of law under the Fourteenth Amendment to the United States Constitution.

6. The Court below bases it's approval of the Trial Court's refusal to permit Petitioner's Counsel to inquire of the expert medical witness, relating to whether or not treatment would enable Petitioner to stand trial at a later date, on an erroneous interpretation of law. Certiorari should be granted because such ruling effectively denies Petitioner of equal protection and due process of law under the Fourteenth Amendment to the United States Constitution.

7. The Court below bases it's approval on the Trial Court's restricting argument of Defense Counsel on the consequence of a verdict of "Not Guilty by Reason of Insanity", on the basis that "such matters are inappropriate". Certio-

rari should be granted because such ruling effectively denies Petitioner of equal protection and due porcess of law under the Fourteenth Amendment to the United States Constitution.

8. The Court below bases it's approval of the Trial Court's failure to properly charge the Jury on the question of a life sentence and the consequence of a life sentence, pursuant to a written request by the Jury, which the Court held as being "not improper". Certiorari should be granted because such ruling effectively denies Petitioner of equal protection and due process of law under the Fourteenth Amendment to the United States Constitution.

9. This Court should grant Certiorari because the Court below found in Number 30 of it's opinion that the Petitioner "could probably communicate with his lawyer, if some relationship was established". The Court below found that the Jury heard evidence authorizing this beyond a reasonable doubt. Certiorari should be granted for the reason that this ruling is erroneous and a misapplication of the law, and that such ruling effectively denies Petitioner equal protection and due process under the law in violation of the Fourteenth Amendment to the United States Constitution.

10. The Court should grant Certiorari to consider whether the Georgia Statute providing for the imposition of the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Court below committed error in approving the request that the Petitioner be examined by the Forensic Service Team of the Georgia Mental Health Institution without Petitioner having his Attorney present. Certainly it must be said that such a proceeding constitutes a critical stage of the proceeding against the Petitioner. The Petitioner was arrested and charged with three murders and three counts of aggravated assault and was indicted by a Hall County Grand Jury and had counsel appointed to represent him. Petitioner had a long history of mental problems and treatment and hospitalization for mental disorder. Petitioner was being treated by psychiatrist and the Mental Health Institution of Hall County. The Trial Judge stated that he desired to satisfy the Courts question as to the mental competency of the Petitioner. At this stage of the proceeding, the Constitutional Rights of the Petitioner guaranteeing due process and equal protection of the law required that the Appellant be represented by counsel and that counsel be

allowed to be present during any examination. This is true irrespective of whether counsel is later furnished with a copy of the Forensic Team Report and whether it be favorable or not. The Court's refusal to allow counsel to be present and ordering the examination, deprives Petitioner of rights to due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution.

The Trial Judge stated that the Court had the inherent power to order the mental examination for the express purpose of satisfying the Court as to the mental competency of the Petitioner. The inherent power was exercised and the result clearly showed the Petitioner mentally incompetent to stand trial.

> Both statute and common law grant the Trial Judge inherent power and authority to satisfy himself that the accused has sufficient mental competency to stand trial. 241/49 Presnell vs. The State.

Here the Court clearly must have found pursuant to the Forensic Team Report that the Petitioner did not have sufficient mental competency to stand trial. To hold otherwise would be a mockery of the statute and common law principles enunciated in the cited case.

Petitioner submits that the Trial Judge erred in refusing to direct a verdict in favor of the Special Plea of Insanity on the trial of that issue for the reason that all the evidence demanded a finding that the Petitioner was not competent to stand trial.

Petitioner clearly demonstrates that the Trial Judge erred in ordering the Petitioner to plead to the Indictment before his mental competency was determined by the Court or by the Special Plea.

> When Defendant is insane at time of trial, he is protected by Special Plea of Insanity under which the Court must determine plea before he is required to plead to indictment. McKenzie v. State 72 App.208.

In the instant case the Trial Judge required the Petitioner to plead to the Indictment before his competency was determined and Counsel for Petitioner stated that a Special Plea would be filed and the Court subsequently ordered the examination of the Petitioner by the Forensic Service Team.

Certainly, it was error to require the Petitioner to plead to the Indictment before all of this was determined.

The overwhelming preponderance of testimony shows that the Petitioner's mental capacity was not sufficient in order for the Petitioner to stand trial. Here, again, the Forensic Service Team, Dr. Ermutlu, an M.D. in psychiatry, and Dr. Eichler, a PH.D. in psychiatry, both unequivocally testified that the Petitioner was not mentally competent. This was the report that was given to the Court, as well as their testimony during the trial of the Special Plea. In addition, Dr. Beall, a private practicing psychiatrist who had been recently treating the Petitioner, unequivocally testified that the Petitioner was not mentally sufficient nor competent to stand trial. In addition, Dr. Alfred Agrin, a psuchiatrist, with the Mental Health of the Northeast Georgia Hospital, with whom the Petitioner was a patient, testified unequivocally that the Petitioner was not mentally competent to stand trial. None of this expert testimony was refutted in any manner whatsoever. The Petitioner's evidence and showing of incompetency is overwhelming, unequivocal, unrefutted and demanded a finding by the Trial Judge, as a matter of law, that the Petitioner was mentally incompetent to stand trial.

Petitioner submits that the Trial Court's requirement that the Petitioner plead to the Indictment before the issue of competency was determined is error. And further, the Petitioner clearly stated that the Special Plea of Insanity must first be determined and would be insisted upon. Nonetheless, the Trial Judge required the Petitioner to plead to the Indictment after being clearly informed that a Special Plea of Insanity would be filed and insisted upon. The Supreme Court of Georgia has held that to require the Defendant to plead to the Indictment before the issue of competency is determined is error.

> When Defendant is insane at the time of trial, he is protected by a Special Plea of Insanity, under which the Court must determine plea before he is required to plead to Indictment. McKenzie v. State, 72 App. 208.

Certainly, on the trial of a Special Plea of Insanity the Jury must Understand the nature of the plea and it's consequences in order to intelligently deal with this issue. To require a Trial Jury to blindly deal with a question that is technical or medical in its nature and to know nothing of the consequences of the verdict, is patently unfair and unjust.

The refusal of the Trial Court to allow the Petitioner to explain in the opening statement to the Jury and in the concluding argument the consequences of a finding in favor of the Special Plea, deprives Petitioner of due process of law under the Fourteenth Amendment to the United States Constitution. Certainly the Jury must understand the consequences of a finding in favor of the Special Ple in order to intelligently deliberate the issue.

The Petitioner sought to inquire of the expert medical witness, the psychiatrist (T-190) whether treatment would afford the Petitioner to be able to stand trial at a later date. Obviously, this is the very crux of the basis of the Special Plea. Such a ruling denies Petitioner equal protection of the law as guaranteed by the United States Constitution.

Petitioner submits that the Trial Court unfairly restricted argument of Counsel in that it didn't allow an explanation to be given regarding a finding of "not guilty by reason of insanity". Certainly for the Jury to have three possible verdicts and to know the consequences of two and not the third places the Jury in such a position as to be completely unable to intelligently deal with the issues and the verdict.

Finally, Petitioner submits that the importance of the death penalty under the Georgia Statute as applied in the instant case, violates the Eighth and Fourteenth Amendments to the United States Constitution. Godfrey v. Georgia, 48 U.S.L.W., 4541 (U.S., May 19, 1980), holds that a death sentence based upon a finding of the aggravating circumstance defined by (b) (7) cannot stand consistently with the Eighth and Fourteenth Amendments, unless all four of the following conditions are met:

(a) A limiting construction must have been placed upon (b) (7) by the Jury instructions, which suffices to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" 48 U.S.L.W. at 4543. It is plain that the language of (b) (7) as written, unless modified by restrictive Jury instructions or judicial interpretation, fails to satisfy this test, because that language includes the phrase "outrageously or wantonly vile, horrible and inhuman," which the plurality in Godfrey declared was insufficient to imply "any inherent restraint on the arbitrary and capricious infliction of the death sentence." 48 U.S.L.W. at 4544. Hence, a death sentence must be set aside if it rests upon a (b) (7) finding,

which was made under procedures that permitted such a finding based upon the quoted language (either exclusively or as an alternative submission supporting a general verdict or finding. Stromberg V. California, 283 U.S. 359, 367-368.)

Godfrey also makes clear that the only acceptable limiting definition is one which narrows (b) (7) so as to "require both evidence of serious physical abuse of the victim before death," 48 U.S.L.W. at 4544, and a "mental state that....led the murdered" to commit such abuse, 48 U.S.L.W. at 4544--which must obviously mean that the serious physical abuse was intentionally inflicted. "Godfrey also makes clear that the only acceptable limiting definition is one which narrows (b) (7) so as to require at the least a finding that the murderer possessed a 'mental state that led him...to torture or commit an aggravated battery before killing his victim.' 48 U.S.L.W. at 4544. This is so because that definition was found by the Godfrey plurality to be the result of the Georgia Supreme Court's "consistent conclusions respecting the (b) (7) aggravating circumstance," 48 U.S.L.W. at 4544; and the making of any ad hoc departures from these consistent conclusions would "create a risk that the punishment (of death) will be inflicted in an arbitrary and capricious manner." 48 U.S.L.W. at 4543, as well as flouting the settled rule that state courts may not juggle their laws in an upredictable and inconsistent fashion to the prejudice of federal constitutional rights. Wright v. Georgia, 373 U.S. 284, 289-291 (1963).

(b) This limiting construction should have been charged to the Jury at trial. Godfrey makes plain both that the purpose of the sentencing standards is to "channel the sentencer's discretion," 48 U.S.L.W. at 4543, and that the constitutional failing found in Godfrey itself was that the sentencer's discretion had not been so channeled because an unlimited view of the statutory language of (b) (7) "may, in fact, have been one to which the members of the Jury in this case subscribed. If so, their preconceptions were not dispelled by the Trial Judge's sentencing instructions. These gave the Jury no guidance concerning the meaning of any of (b) (7)'s terms. In fact, the Jury's interpretation of (b) (7) can only be the subject of sheer speculation." 48 U.S.L.W. at 4544. Unless this vice is cured by proper limiting instructions to the Jury at the penalty trial, Godfrey invalidates any death sentence based upon a (b) (7) finding. A narrowing construction placed upon (b) (7) by the Georgia

Supreme Court on appeal would not cure the deficiency, under established constitutional principles. Shuttlesworth vs. Birmingham, 382 U.S. 87, 91-92 (1965); Presnell v. Georgia, 439 U.S. 14 (1978).

(c) But the limiting construction must also be applied by this Court in it's sentencing review on appeal of the case. This is so because this Court's review is a constitutionally required safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted Defendants," Gregg v. Georgia, 428 U.S. 153, 204, and was relied upon by the Supreme Court of the United States when sustaining the constitutionality of the Georgia statutory procedures. Thus it was that the prevailing opinion in Godfrey emphasized that the Supreme Court of Georgia had not "applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that they involved...depravity of mind.'" 48 U.S.L.W. 4545. Unless such a construction is employed in the sentencing review conducted by this Court, a death sentence based on (b) (7) cannot stand.

(d) The facts of the case must provide fair evidentiary support for a finding that it falls within the proper narrow construction of (b) (7). A finding without fair support in the record is by definition arbitrary, Shware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957), here, the facts cannot supply any "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 48 U.S.L.W. 4545. Here, the facts of the case cannot fairly be found to fall within a properly limited construction of (b) (7).

In the case at hand, we have additional aggravating circumstances, a (b) (2) finding and the vague, ambiguous recitation complained of in Enumeration of Error No. 45, as stated, "all of the evidence of the trial" et al.

The fact that one or more aggravating circumstances other than the one defined by (b) (7) was found in a case does not immunize the Defendant's death sentence from invalidation under Godfrey. If a (b) (7) finding was among those made by the jyr, the ensuing death sentence must be set aside, however, many other aggravating circumstances were also found. The Supreme Court of the United States has recognized as much by vacating any remanding for consideration in light of Godfrey at least four cases in which aggravating circumstances in addition to (b) (7) were found. Baker; Brooks; Collins; Davis. But the point is also clear under long-established constitutional rules.

Pursuant to the Georgia statutory procedure, a sentencing Jury makes it's life-or-death decision after a deliberative process in which it's "attention is directed to the specific circumstances of the crime and the characteristics of the person who committed the crime." Gregg v. Georgia, supra, 428 U.S. The function of the statutory definitions of aggravating circumstances is to direct the Jury's attention to the relevant factors. The Trial Judge is to enumerate in his instructions to the Jury all of those which are warranted by the evidence, 27-2534.1 (c), and the Jury is to consider them all. A life sentence may be recommended even if two or three or four or five aggravating circumstances are found. One or more aggravating-circumstances findings is enough to permit a death sentence, but no particular number ever requires a death sentence. Under this scheme, each and every aggravating circumstance which the Jury finds may therefore tip the delicate balance, and if a death sentence is returned, the part played in it by any single aggravating circumstance with the Jury found "can only be the subject of sheer speculation." 48 U.S.L.W. at 4544. So, if a (b) (7) finding was impermissibly permitted by the Trial Court's instructions and made by the sentencing Jury, it may or may not have spelled the difference between life or death. No one knows, or can know, that it did not.

This situation invokes the ordinary rule that any ambiguity as to whether a Judgment rests upon a constitutionally unsound footing requires its reversal. Shuttlesworth vs. Birmingham, 382 U.S. 87, 91-92 (1965); and cf. the "beyond a reasonable doubt" standard for harmless constitutional error applied in Chapman v. California, 386 U.S. 18, 23-24 (1967). The rule has been invariably applied by the Supreme Court of the United States. So, if a criminal case is submitted to a Jury under instructions which permit it to convict upon alternative legal theories, one of which is constitutionally acceptable and another of which is constitutionally unacceptable, it's general verdict of conviction cannot stand. Stromberg v. California, 283 U.S. 359, 367-368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-292 (1942); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Bachellar v. Maryland, 397 U.S. 564, 570-571 (1940). And the reason for the rule is that it is impossible to say, with assurance, that the result was not determined by consideration of constitutionally impermissible factors.

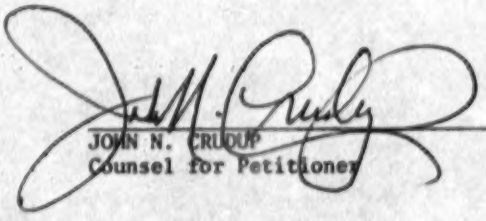
"These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the

guilt-determining phase of any criminal trial." Presnell vs. Georgia, 439 U.S. 14, 16 (1978). Indeed, they apply with added force, because the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion), makes it intolerable that a death sentence should be carried out where there is any ambiguity in the record as to whether constitutional requirements for capital sentencing have been observed. "In death cases doubts as to how defective Jury instructions may have affected Jurors' sentencing deliberations...should be resolved in favor of the accused." Andres v. United States, 33 U.S. 740, 752 (1948). Accordingly, since the Jury's improper finding of a (b) (7) aggravating circumstance cannot be said with reliable assurance to have played no part in its decision to impose a death sentence following such a finding must be set aside, despite findings of other aggravating circumstances which might or might not alone have led the Jury to the same fatal result. Hence, the death sentence herein imposed must necessarily be set aside.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,



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In the Supreme Court of Georgia Decided: FEB 10 1981

36791. STRICKLAND v. THE STATE.

UNDERCOFLER, Justice.

Robert William Strickland was convicted by a jury of the murders of Eddie Lee Carroll, Lester Lee Carroll and Bonnie Mae Carroll, and for aggravated assaults upon Junie Irene Carroll, Elizabeth June Carroll and Cecil Carroll. The death sentence was imposed for each of the three murders. Consecutive ten year sentences were imposed for the three aggravated assaults. His case is before this court on appeal, and for mandatory review of the sentences of death.[1]

1. Strickland's psychiatric evaluation ordered by the trial court[2] was not a "critical stage" of the proceedings; hence, no error was committed by denying his counsel's request to be present during the evaluation. United States v. Cohen, 530 F2d 43 (9) (5th Cir. 1976). The first enumeration of error lacks merit.

2. The trial court correctly submitted the issue of Strickland's mental competency to stand trial to a special jury rather than summarily declaring Strickland incompetent. Code

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[1] Code Ann. § 27-2537.

[2] The authority of the trial court to order the evaluation was not questioned on appeal. Presnell v. State, 241 Ga. 49, 56 (6) (243 SE2d 496) (1978).

APPENDIX 1

Ann. § 27-1502(a). Strickland contends in support of his second and third enumerations of error that the report of the Forensic Service Team unequivocally declared him incompetent to stand trial. However, the report shows that Strickland could understand the charges against him and appreciate the consequences, as well as communicate with his attorney.[3] The report merely expresses concern with Strickland's ability to deal emotionally with the testimony against him. The second and third enumerations of error are without merit.

3. The trial court did not err by refusing to direct a verdict for Strickland on the special plea of insanity or in thereafter ordering Strickland to stand trial on the indictments. Members of the Forensic Service Team testified that they were concerned with whether or not Strickland would be able to control his emotions during trial on the indictments; whether he might commit suicide. Dr. Ermutlu also testified, "I felt that he was aware of the charge, and he was aware of the consequences, and I also felt that he probably could communicate with his lawyer, if some relationship was established." Strickland contends that elsewhere in the transcript of proceedings Dr. Ermutlu contradicted himself, particularly in respect to the question of whether or not Strickland would be able to establish a sufficient relationship with defense counsel to be able to assist in his defense. The State introduced lay testimony indicating that Strickland was feigning incompetency. There is no merit in

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[3] The issue on a special plea of insanity is "whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands." Brown v. State, 215 Ga. 784, 787 (113 SE2d 618) (1960).

Strickland's contentions that, in essence, the court or the jury was bound to accept the testimony favorable to his position and was bound to reject the testimony indicating his competency to stand trial. "Not only the presumption of sanity, Johnson v. State, 235 Ga. 486 (220 SE2d 448) (1975), but also the State's evidence, including the testimony of the psychiatrist, created an issue of fact on . . . [Strickland's] competency for the jury to decide." Leggett v. State, 244 Ga. 226, 227 (3) (259 SE2d 476) (1979). There is no merit in the fourth, fifth and forty-second enumerations of error.

4. Strickland contends in his sixth enumeration of error that the trial court should not have required him to plead to the indictment before his mental competency was determined under his special plea. The record fails to provide a factual basis for this enumeration of error. While represented by counsel, he

pled to the indictment on January 18, 1980. His special plea was not filed until January 21, 1980, three days later. The sixth enumeration of error presents nothing for our consideration.

5. His seventh enumeration of error also is not supported by the transcript of proceedings, which shows without contradiction that that grand jury foreman, whose name appears on the State's list of witnesses, took no part whatsoever in the grand jury's deliberations regarding the indictments returned against Strickland.

6. The eighth enumeration of error, contending that the trial court erred in overruling Strickland's objections to the State's proposed voir dire questions numbers two and three, also finds no factual support in the transcript.[4] The trial court did not rule on the objections when made. Ruling was deferred until the next day to give counsel an opportunity to rewrite their questions. When the court inquired the next day whether the State's questions numbers one, two and three would be asked, defense counsel replied, "That's right." The State thereafter expressly withdrew question number two. The eighth enumeration of error presents nothing for our review.

7. Strickland contends in his ninth enumeration of error that the trial court improperly refused to allow him to ask his proposed voir dire questions numbers eleven, twenty-one, twenty-four and twenty-five to prospective special jurors. The transcript establishes that the trial court allowed his eleventh question to be asked. Questions twenty-one, twenty-four and twenty-five were technical legal questions relating to whether or not the jurors knew the nature and purpose of the trial on the special plea. Answers to the questions would not reveal

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[4] These questions related to the trial on the special plea of incompetence to stand trial.

prejudice against the accused. The nature and purpose of the proceedings were explained to the jury in the court's charge. No manifest abuse of the trial court's discretion has been illustrated. Kyles v. State, 243 Ga. 490 (255 SE2d 10) (1979); Welch v. State, 237 Ga. 665, 671 (229 SE2d 390) (1976); McNeal v. State, 228 Ga. 633, 636 (187 SE2d 271) (1972).

8. Strickland contends in his tenth enumeration of error that the trial court should have excused prospective special jurors for cause. These persons are not named in the enumeration of errors or brief, but the page references to the transcript relate to the examination of Mr. Clarence A. Johnson and Mr. Earley Roberts, Jr. Mr. Johnson was excused for cause. Mr. Roberts responded that he could lay aside anything he might have heard, read or known about the case and base his verdict solely upon the evidence and the charge of the court. No error has been illustrated. Westbrook v. State, 242 Ga. 151, 154(3) (249 SE2d 524) (1978).

9. The eleventh enumeration of error is unsupported by the transcript. Strickland apparently contends that the trial court required defense counsel to use the word "opinion" instead of the word "inclination" while examining prospective special jurors on voir dire. One or more jurors had expressed a lack of understanding of the meaning of the word "inclination." The court suggested the substitution of words. Defense counsel was permitted, however, to continue using the word "inclination" during examination of the remaining prospective special jurors. The eleventh enumeration of error is without merit.

10. The trial court did not err by failing on its own motion to order transcription of the opening statements of counsel on trial of the special plea. Trial of the special plea was civil in nature. Williams v. State, 238 Ga. 298, 303(3) (232 SE2d 535) (1977).

Neither did the trial court err by refusing to allow defense counsel to explain during his opening statement and closing argument the consequences under Code Ann. § 27-1502 of a jury finding in favor of the special plea. See Coker v. State, 234 Ga. 555(5) (215 SE2d 782) (1975). The twelfth and thirteenth enumerations of error are without merit.

11. The issue on the special plea was Strickland's mental capability and comprehension at the time of trial. Crawford v. State, 240 Ga. 321, 326 (240 SE2d 824) (1977). Accordingly, the trial court did not err in excluding on the State's relevancy objection testimony of one of the medical experts relating to whether or not treatment would enable Strickland to stand trial at some future date. Code Ann. § 38-201. The fourteenth enumeration of error lacks merit.

12. Admitting the testimony of the ambulance dispatcher about a telephone call he received was not error. The dispatcher testified that the caller asked for an ambulance to be dispatched to a certain location on Whitmire Circle because there were five to seven people lying up there dead. The caller said he was the killer and that he was calling from a pay telephone because he had shot out the telephone at the house. He said he had been under medical treatment, was insane, and would turn himself in to the police. Witnesses testified that the location of the crime scene was as described by the caller and that the Carroll house telephone had been shot out. The arresting officer testified that Strickland expressed surprise at his arrest because he previously had indicated that he planned to turn himself in. These circumstances suffice for admissibility of the dispatcher's testimony. Constantino v. State, 243 Ga. 595 (255 SE2d 710) (1979); Stanger v. State, 102 Ga. App. 561 (116 SE2d 898) (1960). The fifteenth enumeration of error is without merit.

13. The trial court's comments and instructions to the jury were proper following Strickland's violent outburst in the

courtroom during trial of his special plea of incompetency to stand trial. After Strickland's objection to the court's remarks, defense counsel was given an opportunity to submit a curative instruction to be given by the court. Counsel declined to prepare a specific curative instruction. Instead, he merely requested the court to give a general instruction to the effect that the court had not intended to express any opinion about Strickland's disruptive behavior. The court so charged the jury, and the defense expressed no objection to the charge. The charge was more than adequate to have cured any error if, indeed, there had been error. The sixteenth and seventeenth enumerations of error are without merit.

14. The trial court's charge to the jury on the issue of Strickland's special plea of incompetency to stand trial was full and fair. Crawford v. State, supra. The court need not have charged the exact words of Strickland's first request to charge. Herrmann v. State, 235 Ga. 400, 402 (220 SE2d 2) (1975). Neither did one chance use of the word "insane" instead of "incompetency" in the total context of a proper charge on incompetency to stand trial require reversal. Echols v. State, 149 Ga. App. 620(2) (255 SE2d 92) (1979). The eighteenth, nineteenth and fiftieth enumerations of error are without merit.

15. Mrs. Dean was not disqualified for cause to serve as a juror. Her response on voir dire indicated that she would lay aside any impression or opinion she might have formed based on what she had heard about the case and render a verdict based on the evidence presented in court.[5] Mooney v. State, 243 Ga. 373, 387-88 (254 SE2d 337) (1979); Westbrook v. State, supra at p. 154 (1). Furthermore, Strickland did not strike Mrs. Dean although

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[5] "I would listen to the testimony and judge for myself."

he did not use all his strikes during the jury selection process. Gee v. State, 239 Ga. 583(1) (238 SE2d 356) (1977). The twentieth enumeration of error lacks merit.

16. Strickland objected to the State's characterizing the killings as "brutal" during its opening statement. He contends that the court ignored his objection. To the contrary, the transcript reveals that the court in effect, if not in express words, sustained the objection by immediately admonishing the assistant district attorney that his opening statement "is limited to what you expect to show and the issues, and that alone." The trial court later charged the jury that the opening statements were not evidence. If additional admonitions or instructions were desired, they should have been sought by the defense. The word "brutal" as applied to the killings the prosecution was seeking to prove was not inherently damaging. Pryor v. State, 238 Ga. 698, 706(7) (234 SE2d 918) (1977). No error has been illustrated. The twenty-first enumeration of error is without merit.

17. (a) Admission of certain photographs and letters into evidence was not error. Various ones of the photographs illustrated the premises, the locations of the victims' bodies, and the locations, nature and extent of their wounds. Other photographs showed the gunshot damage to the telephone that the victim June Carroll was using to call the police when Strickland first shot the telephone then repeatedly shot her. The photographs were relevant and admissible. Whitaker v. State, 246 Ga. 163, 165(6) (269 SE2d 436) (1980). Although portions of some of the photographs overlap with other photographs, we certainly cannot conclude that they are "duplications" and "therefore repetitious and designed to be inflammatory."

(b) June Carroll's testimony established that because she was Strickland's former girlfriend she was acquainted with his handwriting. Although she had not received the last of the

letters before the killings, her identification of Strickland's handwriting was sufficient to authorize introduction of all of the letters, including the last one. Daniels v. State, 132 Ga. App. 673, 676(3) (209 SE2d 72) (1974). The twenty-second enumeration of error is without merit.

16. Admission of the testimony of a ballistics expert that he had checked Strickland's hands for gunshot residue soon after arrest was not error. The expert testified that the tests were negative, indicating either that Strickland had not discharged a firearm or that he had washed his hands. The samples themselves were not introduced. Swabbing the hands of an accused to lift gunshot residue does not constitute an unconstitutional search or seizure; and testimony of an expert concerning the swabbing procedure, its physical results and his opinion based on those results does not violate the privilege of the accused against self-incrimination. Strong v. State, 231 Ga. 514, 519 (202 SE2d 428) (1973); Creamer v. State, 229 Ga. 511, 516 (192 SE2d 350) (1972). The twenty-third enumeration of error lacks merit.

19. Enumerations of error twenty-four through twenty-nine and thirty-two through forty relate to the refusal of the trial court to give Strickland's requests to charge numbered one through nine. The court's charge adequately covered the defenses of insanity and delusional compulsion. Accordingly, failure to charge in the exact language requested was not error. Irwin v. State, 244 Ga. 850, 853(4) (262 SE2d 99) (1979). It was not error for the trial court to decline to charge the provisions of the Code relating to the duty of the judge, and the hospitalization of the accused, in the event the jury specified that acquittal was on account of insanity. Pierce v. State, 231 Ga. 731, 733(5) (204 SE2d 159) (1974). The State did not have the burden of proving the sanity of the accused beyond a reasonable

doubt. State v. Avery, 237 Ga. 865, 866 (230 SE2d 301) (1976). There was no factual basis for a charge on voluntary or involuntary manslaughter. "The presumption of sanity does not dissipate with the presentation of evidence to the contrary. . . . The jury is free to reject the testimony of both lay and expert witnesses as to the sanity of an accused, and rely instead on the presumption of sanity with which the accused entered his trial." Potts v. State, 241 Ga. 67, 82 (243 SE2d 510) (1978). Good character was charged as requested. None of these fifteen enumerations of error has any merit.

20. The trial court properly refused to allow the defense to open up once more the issue of whether or not Strickland was competent to stand trial. This issue already had been adjudicated on the special plea. Strickland contends the purpose of going into this question once more was to show the jury that he could not testify. There is no merit in the thirtieth enumeration of error.

21. No error was committed by precluding defense counsel from alluding during his closing argument to the consequences[6] of a verdict of not guilty by reason of insanity. Such matters are inappropriate for inclusion in the court's charge. Hulsey v. State, 233 Ga. 261 (210 SE2d 797) (1974). For the same reasons of policy, they are inappropriate for the defense's closing argument. The thirty-first enumeration of error lacks merit.

22. The court properly charged the jury about the forms of possible verdicts. The forty-first enumeration of error is without merit.

23. The jury found "that the offense of murder of Bonnie Mae Carroll was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind." The jury further

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[6] Hospitalization, etc.

found that "the offense of murder of Eddie Lee Carroll was committed while the defendant was engaged in the commission of another capital felony, the murder of Bonnie Mae Carroll." As to the remaining murder count, the jury found that "the offense of murder of Lester Lee Carroll was committed while the defendant was engaged in the commission of other capital felonies, the murder of Bonnie Mae Carroll and Eddie Lee Carroll." Accordingly, this case does not involve what has come to be known as "mutually supporting aggravating circumstances" within the meaning of Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974). Legare v. State, 243 Ga. 744, 747(4) (257 SE2d 247) (1979); Peek v. State, 239 Ga. 422, 428(6) (238 SE2d 12) (1977). Further review of the aggravating circumstances found by the jury is set forth under the sentence review, infra. The forty-third and forty-fourth enumerations of error are without merit.

24. No evidence in aggravation was offered by the State during the presentence hearing. Rather, the State relied on evidence submitted during the guilt-innocence phase of the proceedings. The State's notice of aggravating circumstances, given some forty-nine days before trial, did not fail to comply with Code § 27-2503. Due process concepts are not involved. Bowden v. Zant, 244 Ga. 260, 263(15)(c) (260 SE2d 465) (1979). The forty-fifth enumeration of error lacks merit.

25. The forty-sixth enumeration of error, wherein Strickland contends that the trial court erroneously refused to allow him to recall a State's witness on the issue of mitigation, lacks a factual foundation in the transcript of proceedings. Drs. Ermutlu and Eichler of the Forensic Services Team were subpoenaed by the State and examined extensively by Strickland during trial of the special plea of incompetence to stand trial. Both were excused after that trial. Dr. Eichler testified again during the guilt-innocence phase, and again was excused. Dr. Ermutlu was

not available and had not been subpoenaed. The court exercised its discretion and granted a continuance so that Dr. Ermutlu could testify the next morning. Following his testimony, he again was excused. After return of the verdicts of guilty, Strickland moved for another psychiatric evaluation. The court denied this motion, stating that the doctors could be called as witnesses. Counsel for the defense then admitted he had not subpoenaed the doctors, and the court in exercise of its discretion denied him a second continuance to have them present. The transcript reveals that the defense wanted the witness to testify that Strickland was incompetent to stand trial, an issue that previously had been adjudicated on trial of the special plea. No manifest abuse of discretion has been illustrated. McCrary v. State, 229 Ga. 733(2) (194 SE2d 480) (1972).

26. No error was committed in giving the jury the written list of aggravating circumstances as charged by the court. Tucker v. State, 244 Ga. 721, 729(10) (261 SE2d 635) (1979); Spraggins v. State, 243 Ga. 73, 74(2) (252 SE2d 620) (1975). The forty-seventh enumeration of error lacks merit.

27. The jury sent a note to the court asking about the possibility of parole if Strickland received a life sentence. The court instructed the jury that their obligation was to return a verdict on the evidence and charge of the court; that they were responsible for the truth of their verdict but not its consequences; that under law the court could not answer their questions about parole. "A trial court's flat refusal to answer a question about parole is not improperly suggestive and is not error." Tucker v. State, supra at p. 730(11). The forty-eighth enumeration of error is without merit.

28. The forty-ninth enumeration presents Strickland's contention that the trial court erred in submitting the trial judge's report at the termination of the trial. This ground

was not briefed or argued. Because this is a death case, we have considered the enumeration. We find no reversible error in the report itself or in the manner or method of its submission. The forty-ninth enumeration of error is without merit.

29. The death penalty opposition responses of the venire persons who were excused for cause met the requirements of Witherspoon v. Illinois, 391 U. S. 510 (1967), as reiterated in Lockett v. Ohio, 438 U. S. 586 (1978). Hance v. State, 245 Ga. 856, 864(6) (SE2d) (1980).

30. The jury heard evidence authorizing the following to be found as facts beyond a reasonable doubt. June Carroll and Strickland had dated for several years. June had terminated the relationship. Strickland had tried to reestablish the relationship. Alternatively, he begged her to be his wife and threatened her if she refused. About three weeks before November 30, 1979, Strickland asked June how she would like it if he killed her mother, brother and sister so she could see how it was to lose someone she loved. He sounded forceful. She hung up the telephone.

Thereafter he wrote her several letters, pleading, sometimes on religious grounds, for her to marry him, and alternately threatening that if she did not marry him he would go insane and do something he would be sorry for. In the letters, he agreed to hold his temper, to be gentle, and to attend church with her. The last of the letters, postmarked November 29, 1979, had "Last Letter" written on the envelope. In it, he stated that he could be pushed only so far, that he must prove to her he said what he meant, and that if she were to date anyone else, he would do what he said he would do.

On the evening of November 29th, he went to the Carroll house and attempted to persuade June that they were man and wife within the meaning of certain biblical verses. When the

discussion became unpleasant, and one of June's male relatives told him to leave, he left stating "I'll see ya'll in court."

During the day on November 30, 1979, he bought a box of 9mm ammunition and attempted to buy an extra magazine or clip for his Browning High Power 9mm semi-automatic pistol. That night, he went again to the Carroll residence after telling June that he wanted to pick up some things he had given her in the past. He wore his heavy coat in the Carroll residence which concealed the large, multi-shot automatic pistol. He followed June back to her bedroom, continuing to plead with her about their relationship.

After June left the room, hoping Strickland would leave, she heard her sister Bonnie tell Strickland, "You're getting June upset, why don't you just leave her alone and leave?" She heard Strickland respond in a loud voice, "I've heard enough of you, shut your damn mouth," after which she heard Bonnie scream, "No, Rob, don't."

The shooting then started. While Strickland was shooting Bonnie, June ran to the hall telephone to summon help. Strickland followed her into the hallway. While June pled for mercy, Strickland first shot the telephone, and then shot June twice in the abdomen, twice in each thigh, five times in her lower buttocks around her rectum and vagina, and once in her right foot. While leaving the Carroll home, he shot and killed June's disabled brother, Eddie, killed her father, Lester, and wounded her mother, Junie. Her brother Cecil saw Strickland shooting, and the empty cartridges flying from the pistol, but he ran and avoided either being killed or wounded.

Strickland then shot through the gas tank of the Carroll automobile, and drove away.

The ambulance dispatcher on duty on the night of the shootings testified that he received a telephone call from a

male who said that an ambulance was needed on Whitmire Circle because there were five to seven people lying up there dead. The caller declined to give his name and telephone number but identified the place on Whitmire Circle. The caller said he was the one who had done it, that he was insane, and that he had been under medical care. When the dispatcher asked the caller to tell where he was, the caller said he was at a pay phone booth in White County; that the phone in the Whitmire Circle house was not working because he had shot it too. The caller asked the dispatcher to send help and said he would turn himself in.

Testimony of the investigating officers and of surviving members of the Carroll family who were present during the shootings[7] described the crime scene, including the many shots that were fired and the position of the bodies. An empty magazine for a 9mm pistol of the type found in Strickland's automobile at the time of his arrest was found in the Carroll house. When Strickland was arrested, the pistol's magazine was loaded alternately with solid and hollow point rounds of ammunition. The pistol was lying on the automobile seat within easy reach. Strickland questioned the arresting officers as to why he was being arrested since he had agreed to turn himself in.

Ballistics evidence established that the many empty pistol cartridge casings found in and outside the Carroll home were fired in Strickland's pistol. Bullets removed from the victims' bodies had been fired from Strickland's pistol.

Medical testimony established that Bonnie's head and face were badly mutilated by either four or five shots fired at a distance of six inches or less. The exact number of shots could not be determined because of the massive damage and disfigurement

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[7] June, Ronnie and Cecil survived and testified.

to her face. She died from injuries to her brain . Lester was shot twice in the left side and once in the neck. He died of his chest wounds. Eddie died of two shots in his chest and abdomen.

Strickland pled both incompetency to stand trial and insanity at the time of the offenses. During trial of the special plea of incompetency to stand trial, the examining professionals expressed concern about how trial on the indictments might impact upon Strickland's emotional problems, particularly, whether he might commit suicide. However, Dr. Ermutlu testified, "I felt that he was aware of the charge, and he was aware of the consequences, and I also felt that he probably could communicate with his lawyer, if some relationship was established." The jury found against Strickland on his special plea. During trial on the indictments, Dr. Ermutlu testified: "I don't have any question in terms of his capacity to distinguish right from wrong."

A crime lab expert testified that he performed a standard test on Strickland's hands to determine the presence or absence of gunshot residue. Finding none, his opinion was that Strickland either had not fired a pistol that day or had washed his hands. The jury was entitled to find from the testimony of the surviving members of the Carroll family that the latter alternative was the fact.

The foregoing evidence is sufficient to support the verdicts of guilty under the current legal standard. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

SENTENCE REVIEW

As required by Ga. L. 1973, p. 159, et seq., Code Ann. § 27-2537(c)(1-3), we have reviewed the three death sentences imposed in this case. We have considered pursuant to the mandate

of the statute the aggravating circumstances found by the jury, and the evidence concerning each crime and the defendant. We conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found the following aggravating circumstances:

(1) Count One. "The offense of murder of Eddie Lee Carroll was committed while the defendant was engaged in the commission of another capital felony, the murder of Bonnie Mae Carroll." Code Ann. § 27-2534.1(b)(2).

(2) Count Two. "The offense of murder of Lester Lee Carroll was committed while the defendant was engaged in the commission of other capital felonies, the murders of Bonnie Mae Carroll and Eddie Lee Carroll." Code Ann. § 27-2534.1(b)(2).

(3) Count Three. "The offense of murder of Bonnie Mae Carroll was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind." Code Ann. § 27-2534.1 (b)(7).

We have applied Code Ann. § 27-2534.1(b)(2) when two murders were committed in a relatively short period of time in what could be fairly viewed as one continuous course of criminal conduct. Peek v. State, 239 Ga. 422, 431 (238 SE2d 12) (1977). One murder in Peek was committed in order to accomplish the kidnapping-rape, whereas the other murder was committed in order to avoid apprehension. One of the murders in Peek may not even have been within the defendant's contemplation when he was committing the other. The overwhelming and uncontradicted evidence in the present case was that the murders of Lester and Eddie Carroll occurred while Strickland was leaving the Carroll house immediately after he had killed Bonnie and wounded June and her mother. The total time interval was very brief. Furthermore, the wounds inflicted upon the members of the Carroll family were part of his carefully planned and carried out plan,

conceived during the weeks before the homicides, to inflict mental distress upon June because she had refused to marry Strickland. He had warned June that he would kill members of her family if she did not marry him. He again had warned her that he said what he meant and that he only could be pushed so far. His final warning was that he would do what he had told her he would do. The separate murders were components of his overall plan. These facts present a compelling case for application of Code Ann. § 27-2534.1(b)(2) to Counts One and Two.

The present case is distinguishable from Godfrey v. Georgia, U. S. (SC , 64 LE2d 398) (1980) in numerous respects. The jury's finding in respect to Count Three, the murder of Bonnie Carroll, was not partial as in Godfrey. Here, the jury found the first component of Code Ann. § 27-2534 (b)(7)[8] and one of the three sub-parts of the second component.[9] Hance v. State, supra at p. 860. The present case is among "those cases which lie at the very core of the Code section." Hance, supra at p. 860. It is not among those "ordinary murders for which the penalty of death is not appropriate." Hance, supra at p. 861. The homicides in the present case did not arise out of a husband-wife domestic dispute. To the contrary, the killings were the culmination of a preconceived plan to inflict mental distress upon June Carroll because she declined to become involved in Strickland's emotional problems by becoming his wife. Bonnie Carroll, June's sister, was not threatening Strickland or subjecting him to any emotional trauma. She merely was pleading with him not to inflict any

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[8] "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman. . . ."

[9] ". . . in that it involved . . . depravity of mind. . . ."

more mental distress upon his sister, June, and to leave the Carroll residence.

In Hance, supra at p. 362, we held, citing Godfrey v. Georgia, supra, that "The instantaneous death of a victim as a result of being killed by a shotgun, although the scene of death be gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind." The scene of Bonnie's death was gruesome. She had been shot through her head and face with hollow-point bullets fired from a powerful automatic pistol held less than six inches from her head. The destruction was so extensive that the medical witness only was able to testify that she was shot either four or five times. This, alone, no other facts appearing, might not suffice for a finding under Code Ann. § 27-2534(b)(7). Hance, supra. But other facts do appear. Strickland did not fire wildly, hitting his victims' bodies at random locations. He fired with a single purpose in mind--to inflict mental and physical pain upon June Carroll, who had rejected his marriage proposal. The lay and expert testimony in the present case established that Bonnie's death wounds were intended to be, and were, gruesome for the purpose of hurting June, just as June's own wounds were intended not to kill June but to cause her great physical pain, and to cause her great mental anguish by disfiguring her body so she would not be desirable to any other man. Strickland accurately and methodically shot June twice in her abdomen, twice in each thigh, five times in her buttocks around her rectum and vagina, and once in her right foot. Strickland wanted June to live. He called an ambulance in an effort to make sure she did live. He was successful. She lived to experience all the physical and mental suffering he inflicted upon her.

Depravity may be proven in many ways, including, as in the present case, by the killing of a victim in a vile, horrible

or inhuman manner so as to inflict mental distress upon her close relative. Blake v. State, 239 Ga. 292 (236 SE2d 637) (1977). We deem it appropriate to consider the nonfatal wounds inflicted upon June as well as the fatal wounds inflicted on Bonnie because they all are aspects of the same depraved plan to inflict mental distress on June. Code Ann. § 27-2534.1(b)(7) was constitutionally applied in this case. Godfrey v. Georgia, supra.

We find that the evidence factually substantiates and supports the finding of the foregoing aggravating circumstances and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). We thoroughly have reviewed the instructions of the trial court during the sentencing phase of the trial, and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978), and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1978). In reviewing the death sentence imposed in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur, except Gregory, J., not participating.

APPENDIX

36791. STRICKLAND v. THE STATE.

1. Jackson v. State, 229 Ga. 191 (190 SE2d 530) (1972).
2. Morgan v. State, 231 Ga. 280 (201 SE2d 468) (1973).
3. Chenault v. State, 234 Ga. 216 (215 SE2d 233) (1975).
4. Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976).
5. Coleman v. State, 237 Ga. 84 (224 SE2d 911) (1976).
6. Harris v. State, 237 Ga. 718 (230 SE2d 1) (1976).
7. Dix v. State, 238 Ga. 209 (232 SE2d 47) (1976).
8. Blake v. State, 239 Ga. 292 (236 SE2d 637) (1977).

deadlock 11 to 1 and had been so for at least an hour, and "it is getting all nasty around the edges," there was no abuse of discretion for court to take sentencing feature from jury and himself impose lawful sentence. 132 App. 870 (209 S. E. 2d 687).

Where defendants were found guilty of kidnapping and rape and trial court directed jury to sentence defendants to life imprisonment on kidnapping count of indictment, and question of punishment on rape count was submitted to jury who deliberated for approximately an hour, then court withdrew such question from jury and sentenced each defendant to term of twenty years on rape count to run concurrently with life sentences, held that there was no abuse of discretion by trial court in removing question. 233/200 (210 S. E. 2d 680).

Fact that trial judge fixed sentence, pursuant to defense counsel's request, rather than jury, as is allowed under statute, did not deprive defendant of right to trial by jury. 133 App. 431 (211 S. E. 2d 387).

Where judge failed to give jury instructions on question of concurrent versus consecutive sentencing, then after reading of sentence judge asked foreman where they had recommendation as to whether sentences should run consecutively or concurrently and foreman replied that they should run consecutively, held that it was obvious that recommendation was not part of written sentencing verdict, that oral recommendation was not based on any procedural instructions by court, and that jury members were not polled, and under circumstances direction given that sentences be served concurrently. 133 App. 819 (212 S. E. 2d 474).

Trial judge was authorized to impose life sentence. 235/826 (221 S. E. 2d 590).

Statement

Not error for prosecuting attorney to mention provisions of this section in opening statement to jury. 229/509 (192 S. E. 2d 253).

Validity of conviction

Where no attempt was made by State to show that appellant had intelligently and understandingly waived assistance of counsel as to those convictions where records fail to disclose that he had counsel, it was error to allow introduction in evidence of record of felony convictions which did not show that appellant was represented by counsel; introduction of these records, over objection required grant of new trial on issue of punishment. 229/561 (192 S. E. 2d 907).

Where judge does not impose sentence fixed by jury, appellant can be resentenced even at this late date by imposition of sentence or sentences that follow verdict of jury. 231/131 (200 S. E. 2d 271).

Waiver

Constitutional question as to Code section cannot be presented first on appeal. 125 App. 204 (186 S. E. 2d 805).

Where no objection is made to admission of evidence, on presentence hearing, too late to raise question after verdict. 228/806 (188 S. E. 2d 511).

Enumerations of error that prior nolo pleas antedated Act and failure of State to give notice came too late where not urged in trial court. 228/501 (186 S. E. 2d 729).

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating

APPENDIX B

circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

ORIGINAL COPY

NO. 80-6786

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT STRICKLAND,

Petitioner,

v.

STATE OF GEORGIA,

Respondent,

RECEIVED
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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the trial court's denial of defense counsel's request to be present during Petitioner's court ordered psychiatric examination constituted a denial of Petitioner's rights to due process and equal protection of the law?

2.

Whether the trial court erred by not summarily declaring Petitioner to be incompetent to stand trial after receiving the psychiatric evaluation of Petitioner?

3.

Whether the trial court committed error of a constitutional magnitude by requiring Petitioner to plead to the indictment prior to the filing and determination on a special plea of incompetency to stand trial?

4.

Whether the evidence produced on the trial of Petitioner's special plea of incompetency to stand trial was constitutionally sufficient to support the jury's finding against Petitioner?

5.

Whether, because the issue of Petitioner's competency to stand trial had already been decided adversely to Petitioner, the trial court erred by refusing to allow defense counsel, on the trial of the main case, to explain during his opening statement and closing argument the consequences of a jury finding in favor of the special plea?

6.

Whether the trial court committed error of a constitutional magnitude by sustaining the district attorney's objection to an irrelevant and immaterial question propounded by counsel for Petitioner on direct examination of his own expert?

7.

Whether the trial court properly sustained the district attorney's objection made during Petitioner's closing argument when counsel for Petitioner attempted to argue the consequences of the jury's finding of not guilty by reason of insanity?

8.

Whether, under the facts of this instant case, the § (b)7 aggravating circumstance passes constitutional muster?

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NO. 80-6786

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT STRICKLAND,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner was convicted of the murders of Eddie Lee Carroll, Lester Lee Carroll, and Bonnie Mae Carroll, and for aggravated assault upon Junie Irene Carroll, Elizabeth June Carroll and Cecil Carroll on January 14, 1980, in the Superior Court of Hall County, Georgia upon Indictment No. P-45860. Following a trial by jury Petitioner was convicted on all six counts and sentences of death were imposed for each murder. Consecutive sentences of ten years imprisonment were imposed on each of the three counts of aggravated assault.

On direct appeal Petitioner's convictions and sentences were affirmed at Strickland v. State, 247Ga. 219, ___S.E.2d ___ (1981). Thereafter, on March 30, 1981, Petitioner's motion for a rehearing was denied.

On April 20, 1981, this Court granted Petitioner an extension of time until June 2, 1981, within which to file his brief and petition for a writ of certiorari.

On June 30, 1981, counsel for Respondent was served with his appearance form, which form indicated that Petitioner's petition for a writ of certiorari was timely docketed in this Court on June 1, 1981.

On July 6, 1981, counsel for Respondent, for the first time, received via mail a copy of Petitioner's petition for a writ of certiorari. This timely Brief in Opposition follows.

The facts underlying Petitioner's convictions and sentences are adequately set forth in the Supreme Court of Georgia's opinion rendered on direct appeal [Respondent's Exhibit A], however, for this Court's convenience the aforementioned facts are repeated below.

The evidence produced at trial reflected that June Carroll and Petitioner had dated for several years. Though June had terminated the relationship, Petitioner tried unsuccessfully on numerous occasions to reestablish the relationship. Alternatively, Petitioner begged June to be his wife and then threatened her if she refused. Approximately three weeks prior to November 30, 1979 [the date of the murders]Petitioner had asked June how she would feel if he killed her mother, brother and sister so that she could know how it was to lose someone she loved. Petitioner sounded forceful. Upset by the conversation, June hung up the telephone.

Subsequently, Petitioner wrote June several letters, pleading, sometimes on religious grounds, for her to marry him, and alternatively threatening that if she refused he would go insane and do something he would be sorry for. In the aforementioned letters, Petitioner agreed to keep his temper under control, to be gentle, and to attend church with her. The last of the letters, postmarked November 29, 1979 [the day before the murders], had "last letter" written on the envelope. In it, Petitioner wrote that he could be pushed only so far, that he must prove to her that he had said what he meant, and that if she were to date anyone else he would do what he said he would do.

On the evening of June 29, 1979, Petitioner went to the Carroll residence and attempted to convince June that they were in fact man and wife within the meaning of certain biblical verses. When the discussion became unpleasant, and one of June's male relatives asked Petitioner to leave, Petitioner left stating, "I'll see ya'll in court."

During the day of November 30, 1979, the date of the murders, Petitioner bought a box of 9mm ammunition and attempted to buy an extra clip for his Browning high-powered 9mm semi-automatic pistol. That night, Petitioner went again to June's residence under the pretext of wanting to pick up some things he had given June in the past. Petitioner wore a heavy coat into the Carroll residence for the purpose of concealing the large semi-automatic pistol. Once inside Petitioner followed June back to her bedroom, all the while continuing to plead with her about their relationship.

After June left the room, hoping Petitioner would also leave, June heard her sister Bonnie tell Petitioner, "You're getting June upset, why don't you just leave her alone and leave?" June heard Petitioner respond in a loud voice, "I've heard enough of you, shut your damn mouth," afterwards June heard her sister Bonnie scream, "No, Rob don't."

At that moment the shooting started. While Petitioner was shooting Bonnie, June ran to the hall telephone to summon help. Petitioner followed her into the hallway. While June plead for mercy, Petitioner methodically first shot the telephone, and then shot June twice in the abdomen, twice in each thigh, five times in her lower buttocks around her rectum and vagina, and once in her right foot. While leaving

the Carroll home, Petitioner shot and killed June's disabled brother, Eddie, killed her father, Lester, and wounded her mother, Junie. June's brother Cecil saw Petitioner shooting and the empty cartridges flying from the pistol, but he ran and avoided either being killed or wounded by hiding.

Once outside in the yard, Petitioner shot through the gas tank of the Carroll automobile before driving away.

An ambulance dispatcher on duty on the night of the shootings testified that he received a telephone call from a male who stated that an ambulance was needed on Whitmire Circle because there were five to seven people lying up there dead. The caller declined to give his name and telephone number but identified the residence on Whitmire Circle where the bodies could be found. The caller said he was the one who had done it, that he was insane and that he had been under medical care. When the dispatcher asked the caller to identify his own location, the caller said he was at a pay telephone booth in White County; that the telephone in the victims' house was not working, and that he [the caller] would turn himself into police at a later time.

At Petitioner's trial, the investigating officers and the surviving members of the Carroll family described the crime scene, including the <u>many</u> shots that were fired and the position of the bodies. An empty clip for a 9mm pistol of the type found in Petitioner's automobile at the time of his arrest was also found in the Carroll's home. When Petitioner was arrested, the pistol's clip was loaded alternatively with solid and hollow point bullets. The pistol was lying on the automobile seat within easy reach of the Petitioner. At the time of his arrest Petitioner asked the officers why he

was being arrested since he had already agreed to turn himself in.

Ballistics evidence produced at trial established that the many empty pistol cartridge casings found in and outside the Carroll home were fired in Petitioner's pistol. Bullets removed from the victims' bodies had been fired from Petitioner's pistol also.

Medical testimony established that Bonnie's face and head were badly mutilated by either four or five shots fired at a distance of six inches or less. The exact number of shots could not be determined because of the massive damage and disfigurement to her face. Bonnie died from injuries directly to her brain. Lester was shot twice in the left side and once in the neck. He died of his chest wounds. Eddie died of two shots in his chest and abdomen.

The surviving members of the Carroll family appeared and testified at trial for the prosecution. Based upon all of the aforementioned evidence the jury appropriately found Petitioner guilty on all counts.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S CONTENTION THAT HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S REQUEST TO BE PRESENT DURING PETITIONER'S COURT ORDERED PSYCHIATRIC EXAMINATION, IS WITHOUT MERIT.
(Contention No. 1).

Here on this petition for a writ of certiorari Petitioner contends that the trial court erred in denying his trial counsel's request to be present during his [Petitioner's] competency evaluation. The trial transcript reveals that while defense counsel initially consented to a psychiatric evaluation of Petitioner, that consent was withdrawn when counsel was informed that the trial court was not inclined to allow his presence during the same. (T. 17). The trial court then exercised its inherent authority to order a psychiatric evaluation and denied defense counsel's request that he be present. Presnell v. State, 241 Ga. 49, 56(6), 243 S.E.2d 496 (1978); Griggs v. State, 241 Ga. 317, 245 S.E.2d 269 (1978). See Estelle v. Smith, ___ U.S.___, 29 Crim. L. Rept. 3031 (1981).

On appeal to the Supreme Court of Georgia Petitioner did not challenge the authority of the trial court to order the subject psychiatric evaluation. Thus any such challenge presented for the first time here on this instant petition would not properly be before the Court. Cardinale v. Louisiana, 394 U.S. 437 (1969).

With reference to Petitioner's contention that his counsel possessed a constitutional right to be present during the subject evaluation, in United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), the Court stated the following:

> "Likewise, we reject Appellant's claim of a constitutional right to have an attorney present at the psychiatric examination since that might defeat the purpose of the examination and since the examination is not the kind of critical stage at which assistance of counsel is needed or even useful." Id., at 48.

But see Estelle v. Smith, ___U.S.___, 29 Crim. L. Rept. 3031 (1981), wherein this Court concluded that a defendant's Fifth Amendment rights are violated if he is compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding under circumstances where the criminal defendant neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence at trial. In Estelle v. Smith, supra, this Court further stated that Smith's Sixth Amendment rights were also violated in that defense counsel had not been notified in advance of the psychiatric examination, nor of the fact that the examination would not only encompass Smith's competency to stand trial but also the issue of Smith's "future dangerousness."

As is readily apparent, Estelle v. Smith, supra, is distinguishable from this instant case in that Petitioner here does not contend that his Fifth nor Sixth Amendment rights were violated, but only that he was allegedly denied due process and the equal protection of the law under the

Fourteenth Amendment. In addition to the foregoing distinction, Respondent notes that in Estelle v. Smith, supra, this Court did not hold that a criminal defendant is entitled to the presence of counsel at a court ordered competency or psychiatric evaluation. The foregoing point is especially made clear in the concurring opinion of Justice Rehnquist. Thirdly, Respondent notes that in Estelle v. Smith, supra, this Court stated that a totally different situation arises, with regards to a criminal defendant's Fifth and Sixth Amendment rights, where the defendant intends to introduce psychiatric evidence at trial. Id., at Crim. L. Rept. 3036.

Over and above the foregoing distinctions, the issue for resolution is whether Petitioner was denied due process of law or the equal protection of the laws by the trial court's denial of counsel's request to be present during a court ordered competency examination. As is revealed by an examination of Estelle v. Smith, supra, in a situation such as that presented to the court by the instant case, i.e., wherein the examination was limited to Petitioner's competency to stand trial, and defense counsel was given adequate notice and an opportunity to consult with his client prior to submission to the ordered competency examination, and where the defendant had raised as an issue his competency to stand trial, Petitioner's defense counsel possessed no constitutional right to be present during a properly court ordered competency examination.

In addition to the absence of any constitutional or state statutory right to have counsel present during a court ordered competency examination, the Respondent notes that the results of the examination proved to be favorable to Petitioner and that Petitioner made use of the same at the proceedings on

his special plea of incompetency to stand trial, and at the trial itself. As noted by the Supreme Court of Georgia in Chenault v. State, 234 Ga. 216, 220, 215 S.E.2d 223 (1975):

> "When a plaintiff in error brings a case here, he must show error which has hurt him. This Court is not an expounder of theoretical law, but it administers practical law, and corrects only such errors as have practically wronged the complaining party."

Accordingly, because Petitioner possess no constitutional right to the presence of counsel during a court ordered competency examination, and because Petitioner cannot demonstrate any resulting harm occasioned by the subject examination, this contention cannot serve as the basis for the granting of the requested writ.

B. PETITIONER'S CONTENTION THAT THE TRIAL COURT ERRED BY NOT SUMMARILY DECLARING PETITIONER TO BE INCOMPETENT TO STAND TRIAL AFTER RECEIVING THE PSYCHIATRIC EVALUATION OF PETITIONER FAILS TO STATE A VIOLATION OF ANY CONSTITUTIONALLY GUARANTEED RIGHT.
(Contention No. 2).

On this contention Petitioner alleges that the trial court committed error of a constitutional magnitude by not summarily declaring him to be mentally incompetent to stand trial as a matter of law after its [the trial court's] receipt of Petitioner's psychiatric evaluation by the Forensic Service Team. In response the Respondent initially notes that Ga. Code Ann. § 27-1502, in pertinent part, specifically provides that whenever a defendant in a criminal case files a special plea of incompetency to stand trial, ". . . it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury." (Emphasis added). Accordingly, pursuant to a binding statutory directive, the trial court properly submitted the issue of Petitioner's competency to stand trial to a special jury.

Secondly, the Respondent notes that in the subject report the Forensic Service Team, contrary to Petitioner's representations, did not unequivocally declare Petitioner incompetent to stand trial. The report showed that Petitioner

could understand the charges against him and appreciate the consequences of a conviction upon the same, and that Petitioner could communicate with his attorney.[1/] The subject report merely expressed concern with Petitioner's ability to deal emotionally with the testimony against him. Thus, there exists no factual basis in the record to support this contention.

Thirdly, Respondent notes that this contention addresses itself to nothing more than an alleged trial error or irregularity, and that the same fails to rise to the level of constitutional dimensions. Accordingly, this contention cannot serve as the basis for granting the requested writ.

C. PETITIONER'S CONTENTION THAT THE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL MAGNITUDE BY REQUIRING PETITIONER TO PLEAD TO THE INDICTMENT PRIOR TO THE FILING AND DETERMINATION ON A SPECIAL PLEA OF INCOMPETENCY TO STAND TRIAL IS WITHOUT MERIT. (Contention No. 3).

On this contention Petitioner alleges that the trial court committed error of a constitutional magnitude by requiring him to plead to the indictment prior to the determination of Petitioner's special plea of incompetency to stand trial. The record however, reflects that while represented by counsel Petitioner pled to the indictment on January 18, 1980. (R. 5).

1/ The issue on a special plea of insanity is "whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands." Brown v. State, 215 Ga. 784, 787, 113 S.E.2d 618 (1960).

Petitioner's plea of incompetency to stand trial however, was not filed until January 21, 1981, some three days later. (R. 17-19). Thus, the record provides no factual basis for the support of this contention and thus this contention cannot serve as the basis for the granting of the requested writ.

D. PETITIONER'S CONTENTION THAT THE EVIDENCE PRODUCED ON THE TRIAL OF HIS SPECIAL PLEA OF INCOMPETENCY WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S FINDING AGAINST HIM IS WITHOUT MERIT. (Contention No. 4).

Under Georgia law in a proceeding on a special plea of incompetency to stand trial the burden rests upon the Petitioner to make out his case by a preponderance of the evidence. Coker v. State, 234 Ga. 555,216 S.E.2d 782(1975). Further, on appellate review the appellate court will not overturn a jury's finding against a special plea unless the evidence warrants a finding for the petitioner as a matter of law.

> "The determination of a preponderance of the evidence is for the jury. This Court will not set aside a verdict (or judgment) finding against a special plea of incompetency at the time of the trial unless it appears that the evidence demands a finding in favor of the plea. (Cites omitted)." Id., at 564.

On the special plea of incompetency members of the Forensic Service Team testified that they were concerned with whether or not Petitioner would be able to control his

emotions during trial on the indictments, and whether Petitioner might become suicidal. Dr. Ermutlu also testified, "I felt that he was aware of the charge, and he was aware of the consequences, and I also felt that he probably could communicate with his lawyer, if some relationship was established."

In addition to the foregoing the state also produced an abundance of lay testimony indicating that Petitioner was feigning incompetency.

In light of the evidence produced, and the presumption of sanity, the determination on the merits of Petitioner's special plea became a question of fact for the jury's determination. Leggett v. State, 244 Ga. 226,259 S.E.2d 476 (1979). Thus, the trial court properly submitted the issue to the jury, and the evidence reveals that their determination adverse to Petitioner is amply supported. Accordingly, this contention cannot serve as the basis for the granting of the requested writ.

E. BECAUSE THE ISSUE OF PETITIONER'S COMPETENCY TO STAND TRIAL HAD ALREADY BEEN DECIDED ADVERSELY TO PETITIONER, THE TRIAL COURT DID NOT ERR BY REFUSING TO ALLOW DEFENSE COUNSEL, ON THE TRIAL OF THE MAIN CASE, TO EXPLAIN DURING HIS OPENING STATEMENT AND CLOSING ARGUMENT THE CONSEQUENCES OF A JURY FINDING IN FAVOR OF THE SPECIAL PLEA. (Contention No. 5).

On this contention Petitioner alleges that the trial court, at pages 1031-1035 of the trial transcript, committed

error of a constitutional magnitude by preventing him from interjecting the issue of Petitioner's competency to stand trial into the trial of the main case, notwithstanding the fact that the issue of Petitioner's competency had already been resolved adversely to Petitioner on the trial of his special plea.

As is revealed by an examination of Crawford v. State, 240 Ga. 321,240 S.E.2d 824 (1977), and Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979), the issues for resolution on the trial of a special plea of incompetency to stand trial, as opposed to the trial of a case where the defendant offers a defense of insanity at the time of the criminal act,are separate and distinct. On the trial of the special plea of incompetency to stand trial the issue is whether the defendant:

> "'is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands.'" Crawford, supra, at 326.

On the trial of the main case, where the defense presented is that of insanity, the issue is whether at the time of the commission of the act, omission or negligence constituting the crime, the defendant possessed the mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence. Crawford, supra at 326. Ga. Code Ann. § 27-702.

As is apparent, the issue of Petitioner's competency to stand trial, which had already been decided adversely to Petitioner, was irrelevant and immaterial upon the trial of the main case. Thus, the trial court properly sustained the district attorney's objection to Petitioner's attempts to interject the same into the trial of the main case. Accordingly, this meritless contention cannot serve as the basis for the granting of the requested writ.

F. THE TRIAL COURT COMMITTED NO ERROR BY SUSTAINING THE DISTRICT ATTORNEY'S OBJECTION TO AN IRRELEVANT AND IMMATERIAL QUESTION PROPOUNDED BY COUNSEL FOR PETITIONER ON DIRECT EXAMINATION OF HIS OWN EXPERT WITNESS. (Contention No. 6).

During the trial on the special plea of incompetency to stand trial, counsel for Petitioner sought to solicit a response to the following question propounded by counsel to his own expert witness:

"Q. Doctor, do you feel that treatment will afford Robert Strickland to be able to stand trial, at a future date?

MR. COLE: If it please the Court, that would be irrelevant to this case and I would object to it.

THE COURT: Objection sustained." (T. 203).

In a proceeding on a special plea of incompetency to stand trial the issue for the jury's determination is whether the defendant is capable at the time of trial of understanding the nature and object of the proceedings

against him and their effects upon him, and whether the defendant is capable of assisting his attorneys in the litigation of his cause.

> ". . . the issue raised by a special plea of insanity at time of trial 'is not, whether the defendant can distinguish between right and wrong, but is, whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands.'" Crawford v. State, 240 Ga. 321, 326, 240 S.E.2d 824 (1977).

As is apparent after an examination of the foregoing authority, only the defendant's competency to presently stand trial is at issue, not his competency at some point in the future. Accordingly, the trial court properly sustained the district attorney's objection to the subject question propounded by Petitioner's counsel along the aforementioned irrelevant lines of inquiry. This contention therefore, cannot serve as the basis for the granting of the requested writ.

G. THE TRIAL COURT PROPERLY SUSTAINED THE DISTRICT ATTORNEY'S OBJECTION MADE DURING PETITIONER'S CLOSING ARGUMENT WHEN COUNSEL FOR PETITIONER ATTEMPTED TO ARGUE THE CONSEQUENCES OF THE JURY'S FINDING OF NOT GUILTY BY REASON OF INSANITY. (Contention No. 7).

On this contention Petitioner alleges that the trial court improperly sustained the district attorney's objection to Petitioner's attempt in closing argument to argue to the jury the consequences of a finding of not guilty by reason of insanity. (T. 1066).

In Hulsey v. State, 233 Ga. 261, 210S.E.2d 797(1974), the Supreme Court of Georgia stated that because the latter portion of Ga. Code Ann. § 27-1503 relates to "matters not pertinent to the jury's determination of guilt or innocence," it was not appropriate to charge the same to the jury. For those reasons set forth in Hulsey, supra, the trial court properly sustained the district attorney's objection to defense counsel's attempts to argue the latter portion of Ga. Code Ann. § 27-1503 to the jury, i.e., the disposition of the defendant upon a finding of a verdict of not guilty by reason of insanity was a matter not pertinent to the jury's determination of guilt or innocence.

Accordingly, this meritless contention cannot serve as the basis for the granting of the requested writ.

H. PETITIONER'S CONTENTION THAT UNDER THE FACTS OF THIS INSTANT CASE THE § (b)7 AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE IS WITHOUT MERIT.
(Contention No. 8).

On this instant petition for a writ of certiorari Petitioner presents a lengthy argument in support of his contention that Ga. Code Ann. § 27-2534.1(b)7 is unconstitutional as applied to the facts of this instant case.[2/] Citing Godfrey v. Georgia, 446 U.S. 420 (1980), Petitioner essentially contends that the trial court failed to give a proper "limiting instruction" regarding the application of § (b)7. Petitioner however, fails to set forth the form such a "limiting instruction" should conceivably take. Petitioner further contends that there exists no evidence in this case to support the jury's finding of the § (b)7 aggravating circumstance.

In Cape v. State, 246 Ga. 520, ___ S.E.2d ___ (1980), the Supreme Court of Georgia was provided with the opportunity to address itself to this issue regarding the alleged need for a limiting instruction on the § (b)7 aggravating circumstance. In Cape, supra, citing Godfrey v. Georgia, supra, the Supreme Court of Georgia reiterated that "'The validity of the Petitioner's death sentence turns on whether, in light of the facts and circumstances of the murders. . ., the Georgia Supreme Court can be said to have applied a constitutional construction of [27-2534.1(b)(7)].'"

2/ A copy of Ga. Code Ann. § 27-2534.1(b)7 is attached as Respondent's Appendix B.

In this instant case, unlike in Godfrey v. Georgia, supra, the jury returned a full and proper finding of the § (b)7 aggravating circumstance, thereby alleviating any necessity for speculation by the appellate court as to the jury's interpretation of any partial finding of § (b)7. With the necessity for speculation by the appellate court removed, rational review of the imposition of the death penalty becomes possible and the fatal defect of Godfrey v. Georgia, supra, is removed.

Thus, Godfrey v. Georgia, supra, is clearly distinguishable from this instant case and accordingly there exists no necessity for a "limiting instruction."

Further, the finding of the § (b)7 aggravating circumstance is amply supported by the evidence beyond a reasonable doubt. In Hance v. State, 245 Ga. 856, 268 S.E. 339(1980), the Supreme Court of Georgia stated that § (b)7 consists of two major components, the second of which has three subparts.

> "(I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant." Hance, supra, at 860.

In order to determine whether the jury's finding of § (b)7 is supported by the evidence, the Supreme Court of Georgia stated that "The evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one subpart of the second component, ..." Hance, supra, at 861.

With regards to a finding of depravity of mind of the defendant, the Supreme Court of Georgia stated that such could be demonstrated by evidence of psychological abuse by the defendant to the victim prior to death, i.e., the anticipation of physical harm. Further, in determining whether the evidence shows depravity of mind, the court stated that "The age, and physical characteristics of the victim may be considered." Hance, supra, at 862.

In this instant case the § (b)7 aggravating circumstance was found by the jury to exist beyond a reasonable doubt in the murder of Bonnie Mae Carroll in that the aforementioned murder was "outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind." (R. 78). The evidence revealed that these were well planned execution style murders. The Petitioner conceived the plan, which required the murder of several members of June's family but not June herself, the Petitioner communicated the plan to June, the Petitioner armed himself accordingly, and then cold-bloodedly implemented his plan.

Prior to the murders the Petitioner had written numerous letters in conjunction with telephone calls to June telling her that he would kill certain selected members of her family in order that she might "know what it felt like to watch somebody [she] loved die and to loose someone [she] loved." (T. 868). On the day before the murders, November 29, 1979, Petitioner sent an envelope which he entitled "last letter" to June wherein he stated that if she were to date any other man:

> ". . . I will do what I said I would do." (T. 1227).

The evidence revealed that Petitioner methodically moved from room to room in the Carroll house, killing certain members of the Carroll family. Petitioner began by shooting Bonnie Mae Carroll, who Petitioner felt had weakened his relationship with June, no less than four times in the face at point blank range with hollow point bullets. The results were massive destruction of the brain and face. Petitioner then moved through the house, killing his victims with multiple gunshot wounds to the upper body and head. However, Petitioner chose not to kill June, but in order to assure that she would indeed suffer not only with the loss of her family, but with her pain too, Petitioner methodically inflicted the following wounds:

> "Two in the abdomen; two of each thigh; five of the buttocks area, down around the rectum; and one in the right foot." (T. 794).

The Respondent cannot help but note that all of the aforementioned wounds, unlike those suffered by the other victims, were inflicted below the chest and head. Further, the number of wounds demonstrate that Petitioner must have had to reload his pistol at some point during the shooting of June Carroll. The facts of this case show nothing less than the cold-blooded execution style killing of innocent people. The Petitioner methodically purchased the necessary materials for the murders and concealed the weapon under a large coat in order to get into the Carroll home. The Petitioner, in fulfillment of his prior threats, killed selected members of June Carroll's family and seriously injured and maimed June Carroll all in order that June might suffer. The facts of this case remove it from that category

of ordinary murders and places it squarely under the § (b)7 aggravating circumstance. The circumstances of the murder of Bonnie Mae Carroll reflect nothing less than the mental processes and manifestations of a depraved mind. As correctly noted by the Supreme Court of Georgia on direct appeal of this instant case:

> "Depravity may be proven in many ways, including, as in the present case, by the killing of a vi tim in a vile, horrible or inhuman manner so as to inflict mental distress upon her close relative." Strickland, supra, at 232.

As is readily apparent upon an examination of the gruesome facts of this instant case, Petitioner's challenges to the applicability of the § (b)7 aggravating circumstance are without merit. Thus, this contention cannot serve as the basis for the granting of the requested writ.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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